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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-517

ELISHA COMBS,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

		Page
I.	Official Reports	1
II.	Ground for Jurisdiction	1
III.	Question Presented for Review	2
IV.	Statement of the Case	2
V.	Argument —	
	Question Presented No. 1	
	Did the Sixth Circuit Court of Appeals follow *Jones* v. *United States*, 362 U.S. 257 (1960), when it denied standing to challenge a search to the petitioner when the petitioner was charged with receiving, possessing, and concealing contraband in a federal indictment?	3
VI.	Conclusion	5
VII.	Appendix —	
	A — Opinion of the Court	6
	B — Order denying Petition for Rehearing	9

LIST OF CASES CITED

Jones v. United States, 362 U.S. 257 (1960)	3
United States v. Lopez, 420 Fed. (2nd) 313 (2CA 1969)	4
Wong Sun v. United States, 371 U.S. 471 (1963)	4

STATUTES

Title 18, U.S.C. § 659	2
Title 28, U.S.C. § 1254 (1)	1

CONSTITUTIONAL REFERENCES

Page

Amendment IV — Constitution of the United States .. 4

Amendment V — Constitution of the United States .. 4

RULES OF COURT

Rule 41 (e), Federal Rules of Criminal Procedure .. 3

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OFFICIAL REPORTS

The Sixth Circuit Court of Appeals case of United States v. Combs is not yet officially reported. The unofficial report is attached as Appendix "A" to this Petition. Also attached to this Petition as Appendix "B" is the Court's order overruling Petitioner Combs' request for a rehearing.

GROUND FOR JURISDICTION

The Sixth Circuit Court of Appeals decision was rendered on August 12, 1971. The "Petition for Rehearing" was denied by the Sixth Circuit Court of Appeals in its order entered on September 15, 1971. The statutory authority for this appeal is 28 U.S.C. § 1254 (1).

QUESTION PRESENTED FOR REVIEW

Did the Sixth Circuit Court of Appeals follow *Jones* v. *United States,* 362 U.S. 257 (1960), when it denied standing to challenge a search to the Petitioner when the Petitioner was charged with receiving, possessing, and concealing contraband in a Federal indictment?

STATEMENT OF THE CASE

Petitioner Combs was indicted by a Federal Grand Jury on a charge that he unlawfully, willfully, and knowingly did receive, possess and conceal certain liquor which had been stolen from Interstate commerce in violation of Title 18, U.S.C., § 659.

The Petitioner entered a plea of not guilty and filed a pre-trial Motion to Suppress the contraband liquor alleging that the Affidavit used to obtain a search warrant was defective.

Without the issue of standing having been raised in the trial court, the court overruled the Motion to Suppress.

The Petitioner was found guilty by a jury and the Court sentenced the Petitioner to two (2) years imprisonment and imposed a fine of Five Thousand ($5,000.00) Dollars.

The Petitioner appealed the decision of the District Court for the Eastern District of Kentucky to the Sixth Circuit Court of Appeals and on August 12, 1971, the Sixth Circuit Court of Appeals affirmed the judgment of conviction.

A Petition for Rehearing was filed on August 25, 1971, and the rehearing was denied by an order of the Sixth Circuit Court of Appeals entered on September 15, 1971.

ARGUMENT

QUESTION PRESENTED NO. 1

DID THE SIXTH CIRCUIT COURT OF APPEALS FOLLOW JONES v. UNITED STATES, 362 U.S. 257 (1960) WHEN IT DENIED STANDING TO CHALLENGE A SEARCH TO THE PETITIONER WHEN THE PETITIONER WAS CHARGED WITH RECEIVING, POSSESSING, AND CONCEALING CONTRABAND IN A FEDERAL INDICTMENT?

The Sixth Circuit Court of Appeals held that before an evaluation of a search may be made the party challenging the search must demonstrate that he has standing to raise the issue.

However, when the accused is charged with a crime which includes "possession" as one of its elements, the accused finds himself in the dilemma posture discussed in *Jones* v. *United States,* 362 U.S. 257:

> "The same element in this prosecution which has caused a dilemma, that is, that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized which ordinarily is required when standing is challenged."

If the accused admits possession in order to acquire standing, the admission may be used against him at his trial on the merits.

The *Jones* case, perceiving this dilemma, correctly held that when one is charged with a crime, having as one of its elements "possession", standing is automatically conferred, "under any fair and rational conception of the requirements of Rule 41 (e)."

The Sixth Circuit Court of Appeals in its decision of August 12, 1971, annexed as Appendix "A", has failed to give to the Petitioner the benefit of the exception which the *Jones* case announced.

In the Sixth Circuit Court of Appeals' order denying a rehearing, the Court cited *Wong Sun* v. *United States*, 371 U.S. 471 (1963), and *United States* v. *Lopez*, 420 Fed. (2nd) 313 (2 CA 1969). The Sixth Circuit cited *Wong Sun* and *Lopez* as limiting *Jones* to the victim of a search.

The basis for the Court limiting *Jones* cannot be found in either *Wong Sun* or *Lopez*.

Both *Wong Sun* and *Lopez* held that an accused may not vicariously rely on the Fourth Amendment rights of a third party.

Wong Sun attempted to rely on the rights of Blackie Toy and Johnny Yee who were arrested without probable cause.

Lopez attempted to rely on Cooper's successful motion to suppress evidence obtained without a search warrant.

Alternatively, *Lopez* attempted to rely upon a "possessory interest" in the articles seized, but he was not charged with a crime having as one of its elements "possession", but was charged with a crime having to do with defrauding the Internal Revenue Service.

Since Petitioner Combs desired to assert his own rights under the Fourth Amendment and not the rights of others, but, could not acquire standing to assert those rights without first surrendering his Fifth Amendment right against self-incrimination, the Sixth Circuit Court of Appeals erred in its ruling that Petitioner did not have standing.

The Petitioner respectfully requests the Supreme Court to issue a Writ of Certiorari so that the line of cases denying standing to those who would vicariously claim Fourth Amendment rights could be distinguished from the line of

cases where the accused may not develop his standing by claiming ownership or possesison without incriminating himself on the isssue of guilt.

The Petitioner would urge the Court to adopt a rule: **that when an indictment charges the accused with receiving, possessing, or concealing contraband, the accused has standing to challenge the search and seizure of the said contraband.**

The Fifth Amendment rights protecting against self-incrimination may then be properly balanced with the Fourth Amendment rights against unreasonable searches and seizures.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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APPENDIX A

No. 20947

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ELISHA COMBS, *Defendant-Appellant.*	APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed August 12, 1971.

Before: PHILLIPS, Chief Judge, and EDWARDS and BROOKS, Circuit Judges.

PER CURIAM. The single issue argued on this appeal by the defendant-appellant is the validity of a search warrant. The government contends that such issue need not be decided as the defendant lacks standing to challenge the legality of the search and seizure. We agree and affirm the judgment of conviction.

Defendant was indicted and convicted by a jury of receiving and concealing twenty-six cases of taxpaid whiskey stolen from an interstate shipment in violation of Title 18 U.S.C. § 659. The allegedly defective search warrant

was executed upon the premises of the father of the defendant, which were located at Hazard, Kentucky. The defendant lived in Newport, Kentucky, and was not present when the warrant was executed and the whiskey discovered inside a shed a short distance from his father's residence. At the time of the search, the mother of the defendant produced a rent receipt showing that the shed was under lease to a Jim Martin and Charlie Chapman. The defendant disclaimed any interest in or knowledge of the whiskey in the shed, and there was testimony at the trial that it had been placed there by one of the named lessees.

A motion to suppress the evidence seized as a result of the search of the shed was made by the defendant and his two codefendants[1] prior to trial and, following an evidentiary hearing, was denied by the District Judge. The denial was apparently grounded on the conclusion that the allegedly defective affidavit for the search warrant did provide a sufficient basis for a finding of probable cause. There was no evidence introduced at the hearing relating to the standing of the defendant to challenge the validity of the search.

As the evidence at the trial showed, the defendant, a resident of Newport, Kentucky, asserted no possessory or proprietary claim to the searched premises located in Hazard, Kentucky, or to the stolen property that was seized. Under such circumstances "[t]he established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Alderman* v. *United States,* 394 U.S. 165, 171-172 (1969), and

[1] Defendant's father, a codefendant, was convicted but did not appeal, the other codefendant was acquitted on a related charge.

at page 173 quoting the rule as stated in *Jones* v. *United States,* 362 U.S. 257, 261 (1960):

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else . . .
>
> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."

This rule has been stated and consistently followed by this Court in many cases, e.g. *United States* v. *Gregg,* 403 F.2d 222 (6th Cir. 1968), *aff'd.* 394 U.S. 489, *rehearing denied* 395 U.S. 917; *United States* v. *Graham,* 391 F.2d 439 (6th Cir. 1968), *cert. denied,* 393 U.S. 941; *United States* v. *Thomas,* 342 F.2d 132 (6th Cir. 1965), *cert. denied* 382 U.S. 855; *Hardwig* v. *United States,* 23 F.2d 922 (6th Cir. 1928).

The judgment of conviction is affirmed.

APPENDIX B

No. 20,947

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ELISHA COMBS,
Defendant-Appellant.

ORDER

(Filed September 15, 1971)

Before: PHILLIPS, Chief Judge, and EDWARDS and BROOKS, Circuit Judges

Upon consideration, defendant-appellant's petition for rehearing is denied. See Wong Sun v. United States, 371 U.S. 471 (1963); United States v. Lopez, 420 F.2d 313 (2nd Cir. 1969).

It is so ORDERED.

Entered by order of the Court
/s/ JAMES A. HIGGINS, Clerk